Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | WC Docket No. 07-135 |
| Establishing Just and Reasonable Rates For Local Exchange Carriers | ) | |

To: The Commission

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**COMMENTS OF FUTUREPHONE.COM, LLC**

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## COMMENTS OF FUTUREPHONE.COM, LLC

Futurephone.com. LLC ("Futurephone"), by its attorneys, hereby submits comments in the above-captioned proceeding pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM") released on October 2, 2007.[1] In support hereof, the following is respectfully shown:

## I. Statement of Interest

Futurephone provides a service that enables U.S. consumers to make overseas calls via the Internet at prices that are substantially less expensive than those charged by conventional interexchange carriers ("IXCs"). Futurephone has a strong interest in this proceeding as its survival as an alternative service provider, and consumer access to these alternative services, in large part hinges upon the regulatory decisions that the FCC will render.

### A. Identity of Futurephone

Futurephone was founded in 2006 by two telecommunications entrepreneurs that have over 40 years combined experience in the telecommunications industry, including many years with America's largest IXCs. These entrepreneurs invested a significant amount of their own money, time

[1] See In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Notice of Proposed Rulemaking, FCC 07-176, WC Docket No. 07-135 (Oct. 2, 2007).

and resources, to launch Futurephone. The sole purpose of Futurephone is to offer a competitive and economical alternative to American consumers for international communications services.

B. Futurephone's International Internet Service

From October 2006 until February 2007, Futurephone provided a unique service whereby, for the cost of a call to Iowa or Minnesota, consumers could access the Internet and communicate overseas for no additional charge. During this time, U.S. callers placed over 7 million requests for Futurephone's service. This service entailed a Local Exchange Carrier (LEC) terminating voice traffic at a Futurephone Internet portal. The caller was then prompted to enter the country code and telephone number of the party to be reached. Futurephone transmitted the call overseas via the Internet. Futurephone itself paid significant terminating access fees to overseas service companies who in turn handed off this Internet traffic to carriers who delivered this traffic to its ultimate destination.

When Futurephone launched its service in October 2006, it rapidly became very popular. Several million people utilized Futurephone's service to make economical international calls from their own phones. Futurephone did not charge a fee for its service, rather, it recovered its costs of providing that service through contractual arrangements with LECs that terminated service at Futurephone's Internet portals.

Futurephone's service was cut short only a few months after it was launched due to certain large IXCs who refused to pay legally tariffed access termination charges to the LECs that served Futurephone's Internet portals. At the same time, these IXCs launched a series of legal actions

against Futurephone and others, with the obvious intent of snuffing out competitive service offerings such as those discussed in the FCC's NPRM.

Since Futurephone's business model depends largely on marketing fees from LECs for traffic routed to its Internet portals, the fate of Futurephone's business, and of consumer choice for economical, alternative communications services, depends entirely on the outcome of this FCC rulemaking proceeding. Accordingly, Futurephone has standing as a party in interest to file these comments.

## II. Summary of the NPRM

The Commission initiated this rulemaking largely to ensure that terminating access rates remain just and reasonable even if the terminating carriers experience significantly high volume traffic.[2] This proceeding focuses on allegations raised by certain IXCs that some LECs have earned inordinately high rates of return due to what can broadly be termed "high volume traffic" on their networks.[3] The FCC has identified the cause of this high volume traffic as the "deployment of chat lines, conference bridges, or other similar high call volume operations in the service areas of certain rate-of-return or competitive LECs."[4] Although not specifically mentioned in the NPRM, Futurephone's international Internet service and similar services offered by other entities should also be addressed in this proceeding due to common regulatory issues.

There are certain regulatory issues applicable to "high volume traffic." Originating carriers allege that terminating carriers in some instances are earning unreasonably high rates of return from this traffic. In addition, there are allegations that the sharing of terminating access charges between

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[2] Id. at ¶ 11.
[3] Id. at ¶ 12.

terminating carriers and various enhanced service providers ("ESPs") is in violation of the Communications Act of 1934, as amended (the "Act") and applicable tariffs. The Commission has initiated this rulemaking proceeding to solicit comments on these and related issues, and to adopt regulations in the public interest.[5]

It is fair to say that the FCC already appears to be predisposed against these types of practices; tentatively concluding that a "rate of return carrier that shares revenue, or providers other compensation to an end user customer, or directly provides the stimulating activity, and bundles those costs with access is engaging in an unreasonable practice . . . ."[6] That may in large part be due to the IXCs' aggressive efforts to shape the debate on these regulatory issues, without benefit of input from consumers and ESPs.

## III. Summary of Futurephone's Comments

Futurephone parts company with the FCC's tentative conclusions. In the interests of consumers, and consistent with regulatory precedents, the FCC should conclude that these "high volume traffic" arrangements are just and reasonable. There is nothing per se unjust or unreasonable about a terminating carrier sharing terminating access charges with a third party that provides a service to the originating caller, which is the case in essentially all of the "high volume" arrangements under consideration here.

Nevertheless, there obviously have been instances of excessive rates of return due to some unreasonably high terminating access rates. The FCC ought to create general guidelines, as it has suggested in the NPRM to deal with those extreme situations, while also ensuring that these

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[4] Id.
[5] Id. at ¶¶ 13-16 (citations omitted).

legitimate service arrangements can continue.[7] Rather than looking for ways to punish or constrain these arrangements, the industry needs regulatory guidelines so that LECs and third parties may continue to offer competitive services to interested consumers, without fear of constant litigation from IXC competitors.

Futurephone's situation is quite similar to that faced by MCI decades ago when it first attempted to provide long distance service in competition with a monopoly service provider, AT&T. Futurephone, like MCI, wants to offer consumers a low-cost alternative to established providers' high-priced calling offerings by using a relatively new technology, the Internet, to bypass the conventional switched telephone network. After much litigation, and initial reluctance by the FCC, the Commission ultimately determined that MCI's service complied with applicable tariffs, and furthered the regulatory goal of promoting competition in the communications marketplace. The result was effective competition in the long distance market, with more choices and lower prices for consumers.

The Commission can similarly promote competition in this proceeding by making it clear to sitting judges, state utility commissions, service providers and consumers, that enhanced service offerings such as Futurephone's are legal and in compliance with applicable federal tariffs. Futurephone's business model largely depends on its recovering costs by obtaining marketing fees from LECs that terminate traffic at its Internet portals. Futurephone is an end-user of the LECs' services. It is perfectly just and reasonable for LECs to impose terminating access charges on IXCs for the type of traffic that is terminated at Futurephone's Internet portals. The IXCs charge their customers to originate calls to enhanced services. Their customers make informed decisions about

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[6] Id. at ¶ 19.

the cost and quality of Futurephone's Internet service versus traditional switched international calls. For their part the LECs, by virtue of these arrangements with Futurephone and other enhanced service providers, make enhanced services available to the originating caller. All of this is perfectly consistent with the federal access charge regime and with regulatory precedents.

The Commission has previously found that there is nothing per se unlawful about access revenue sharing. With respect to these high volume services, there are distinct and discernible public interest benefits to permitting revenue sharing: the terminating LECs and service providers like Futurephone make enhanced services available to the IXCs' customers at little or no additional costs. But for this fee sharing arrangement, Futurephone would be unable to recover the costs it incurs in overseas termination charges. Concomitantly, for the small LECs with whom Futurephone works, these enhanced service arrangements provide legitimate, new revenue sources in economically distressed markets where wireline revenues are declining every year. There's no reason why these LECs should be prohibited from entering into these arrangements, so long as the rates for terminating high volume traffic are reasonable.

One possible solution to the problem of ensuring that LEC access charges remain reasonable when they experience high volume traffic could be for the LECs to separately categorize high volume traffic in their tariffs. In some instances, a "reasonable" rate range for this type of traffic might be lower than rates charged for conventional IXC traffic.

A large part of the perceived problem here has been created by the IXCs themselves, because they have converted most of their customers to flat-fee, unlimited calling plans. Consequently, another regulatory solution would be to give originating carriers the freedom to identify "high

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[7] Id. at ¶ 20.

volume calling" customers and either bill them on a metered basis for these calls, or charge a premium over their monthly flat-fees, to cover the costs of initiating these calls. Either of these approaches would permit competitive services such as Futurephone's to enter the marketplace, while ensuring that access charges for high volume traffic remain just and reasonable.

The Commission should also make clear in the orders and regulations promulgated in this proceeding that any IXC that refuses to pay LECs' for their tariffed terminating access charges, has engaged in illegal "self-help" in violation of Section 201(b) of the Act. Unless the IXCs' sole motivation is indeed to hinder or kill-off competitive services, there should be no reason why these issues have to be dragged through multiple court and PUC proceedings. The access charge regime was created by the FCC; the FCC surely has the authority and intellectual capability to come up with appropriate regulatory solutions for these enhanced service offerings.

## IV. The Commission Should Ensure that Competitive Services Such as Futurephone's can be Offered to U.S. Consumers

The Commission solicited comments on AT&T's contention that any access revenue sharing between a LEC and its customers should be deemed illegal, even if the LEC does not attempt to recover the cost of the "compensation" through tariffed access charges.[8] That argument amounts to a regulatory attempt to hinder or prohibit competition. FCC precedents hold that there is nothing unlawful about access revenue sharing; to the contrary, these arrangements are for the benefit of the calling parties and other interested consumers.

The Commission has historically promoted competitive services such as Futurephone's through local exchange tariffs, in spite of AT&T's attempts to stifle them; that should be the focus of

[8] Id. at ¶ 20.

this rulemaking proceeding. Nearly forty years ago, MCI introduced a microwave-based service that enabled customers to make economical long distance calls utilizing microwave hops that bypassed the switched circuit network of AT&T, the then-monopoly telephone service provider.[9] MCI needed access to AT&T's local facilities to link its facilities to the premises of MCI's subscribers; but, AT&T denied MCI interconnection, claiming that it violated its local tariff.[10]

After years' worth of protracted litigation, the FCC ordered AT&T to provide interconnection to MCI,[11] and to file interstate access tariffs that provided MCI and other competitive carriers with the facilities necessary to provide those services.[12] The Commission adamantly expressed its view that established carriers should afford their customers the option of obtaining new services through reasonable terms set forth in their tariffs, in order to meet the public need and demand "for new and diverse sources of supply and competition" in the communications marketplace.[13] The FCC's regulatory decisions allowed MCI to survive and flourish as a provider of long distance and other services. Within a few short years, MCI became a major competitor to AT&T, offering long distance services at about half the rate AT&T charged. As more customers signed up with MCI, AT&T was forced to reduce its long distance rates.[14] The ultimate result was a thriving competitive long distance market, with lower prices and more choices for all consumers.

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[9] See Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 FCC 2d 413 (1974) at ¶ 9 (citations omitted).
[10] Id.
[11] Id.; MCI Telecommunications Corp. v. FCC, 580 F.2d 590, 591 (DC Cir. 1978) ("Execunet II") (subsequent history omitted).
[12] See Bell System Tariff Offerings at ¶ 19 (citations omitted).
[13] See Specialized Common Carrier Services, 29 FCC 2d 870, ¶ 103 (1971) (subsequent history omitted); Bell System Tariff Offerings at ¶ 16.
[14] See "Assessing the Impact of Divestiture and Deregulation in Telecommunications," Southern Economic Journal, Vol. 59, No. 3 (1993) at 440. AT&T reduced its long distance rates by 45% within a few years after the FCC ordered AT&T to file tariffs that permitted competitive services.

Futurephone's objective here is precisely the same as MCI's: to use new technology – the Internet – to bypass the public switched telephone network ("PSTN"), providing alternative international voice services (using Internet protocol) to consumers at lower costs than most of the IXCs wildly-inflated charges for comparable switched-services. By utilizing Futurephone's service, consumers can call overseas for the cost of a domestic long distance call, which is substantially less than that of an international call.

The Commission's most recent study of U.S. telephone usage shows that the average "cost" of an IXC-provided international call is 14 cents per minute.[15] But, depending on the country called and the customer's calling plan, international calling rates charged by the Nation's largest carriers can be absurdly expensive. For instance, under AT&T's "basic" international calling rates, calls to Central America are as high as $4 per minute; calls to Europe and Japan as much as $3 per minute.[16] IXCs are facing aggressive competition for high volume traffic precisely because their own rates for these services are too high. If that were not the case, their customers would have no financial incentive to turn to alternative service providers such as Futurephone. The FCC cannot fairly resolve the issues in this rulemaking proceeding without also taking administrative notice of these facts.

Domestic long distance calls are substantially less expensive than international rates charged by the IXCs: the average charge for a domestic long distance call is six cents per minute.[17] Most IXCs offer unlimited domestic long distance calling plans, which makes

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[15] See Trends in Telephone Service, Industry Analysis & Technology Division, Wireline Competition Bureau (Feb. 2007) at Table 13.4.
[16] See AT&T International Calling Rate schedule, attached hereto as Exhibit One.
[17] See Trends in Telephone Service at Table 13.4.

Futurephone's overseas calls even cheaper for many consumers. AT&T's Unlimited Plus plan, for example, provides its customers with unlimited interstate calling for $32.99 per month. The originating carriers, through their own pricing plans and decisions, have created incentives for their customers to bypass their networks and seek out alternative service arrangements.

Futurephone's brief history is indicative of the popularity of these services among the calling public. During the brief period that Futurephone was in business it received nearly 7 million requests for service; it paid termination fees to foreign Internet service providers ("ISPs") for more than 30 million minutes of Internet connections.

Futurephone-type services are clearly in demand by U.S. consumers. The FCC should enable consumers the option to have access to them. The FCC ensured MCI's survival, and the explosive growth of the inter-exchange market, through reasonable regulations and tariff interpretation. It should do the same in this rulemaking proceeding by finding that access charge sharing arrangements for the provision of "enhanced services" are presumptively lawful.

## V. Futurephone is an End-User of LEC Services

The FCC should clarify in this proceeding that domestic terminating access tariffs apply to services such as Futurephone's, that Futurphone is an ISP or an ESP, and that inbound calls to Futurephone's portals terminate in the U.S. It is absolutely imperative that the FCC reach these regulatory conclusions, otherwise, there will be regulatory chaos throughout the U.S. as different federal courts and state public utility commissions reach different conclusions about the applicability of the federal access charge regime to high volume services such as Futurephone's. The IXCs have

their own anti-competitive reasons for promoting that regulatory confusion; the public interest warrants that the FCC address and clarify these issues.

The applicable federal tariff system provides a useful and usual mechanism for initiation of new, alternative services that are provided via local exchange facilities.[18] While Futurephone used the Internet to deliver calls overseas, it still required LECs to deliver and terminate telecommunications traffic at its Internet portals. Futurephone's service is clearly covered under the LECs' terminating access tariffs.

As illustrated by interstate access tariffs filed by two LECs serving Futurephone, Futurephone was the called party for IXC traffic that was delivered to its portals, i.e., they terminated IXCs' traffic at Futurephone's Internet portals and may assess access charges on IXCs for that service. Both of these tariffs LECs state that an "end user" of their access services is defined as "any customer [that is] not a carrier," and in turn defines "customer" as "any entity which subscribes to the services offered under this tariff."[19]

In the recent Farmers & Merchant's decision, the Commission, in reviewing a similar tariff, held that a customer/end user of a LEC's service is any entity that subscribes, i.e., enters its name for service by a LEC, regardless of whether that entity pays the LEC for service.[20] The Commission also stated that a LEC's payment of marketing fees to an entity that subscribes to its service does not affect its status as a customer or end user.[21] Because Futurephone entered its name for service with

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[18] See Execunet II, 580 F.2d at 593 (citation omitted).
[19] See Great Lakes Communications Access Tariff, Tariff F.C.C. No.1 at 2-59 and 2-61 and Superior Telephone Cooperative Access Service Tariff, Tariff F.C.C. No. 1 at 12.
[20] See Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co, FCC 07-175, File No. EB-07-MD-001 (Oct. 2, 2007) at ¶ 38.
[21] Id.

the LECs, which delivered traffic to its Internet portals, it was a customer/end user of their services, according to the terms of their tariffs.

Also, Futurephone does not charge calling parties for its services, nor does it bill calling parties for its services. Under relevant historic definitions and precedents, Futurephone is an end user, not a telecommunications carrier.

A. How Futurephone's Service Works

Futurephone's service would be initiated when a telephone call was terminated at one of its Internet portals. When a call was delivered to a Futurephone Internet portal, the caller was prompted to enter the country code and overseas telephone number the caller was trying to reach. When the new number was entered, Futurephone's server converted the voice protocol to Internet protocol and sent the new call overseas via the Internet, to an ISP which in turn terminated the call in the country of destination. Futurephone paid all call termination fees to the foreign ISPs.

B. Futurephone is an Enhanced Service Provider

The Commission has viewed some telecommunications services on an "end-to-end" basis i.e., viewing a call as a single continuous communication originated by an end-user and terminating at its ultimate destination.[22] That analysis does not apply to Futurephone's service.

In the IP in the Middle case, the FCC held that a service provided by AT&T wherein it converted a telephone call into IP format, transported it over its Internet backbone, converted it back to voice format, and delivered it to a LECs' switch, was a telecommunications service subject to

[22] See e.g., In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, 19 FCC Rcd 7457, ¶ 1 (2004) ("IP in the Middle").

access charges.[23] The Commission reasoned that AT&T simply used "IP in the middle" to complete an end-to-end telecommunications call because: (a) AT&T charged customers for its service, and thus was a telecommunications carrier; (b) its service originated and terminated on the PSTN; and (c) there was no net protocol conversion and no additional functionality provided to callers due to AT&T's use of IP technology.[24] The Commission used a similar analysis to determine that certain prepaid calling cards were "telecommunications services" subject to the end-to-end analysis and applicable regulation.[25]

By comparison, Futurephone' service is not a telecommunications service and should not be subject to the end-to-end analysis. First of all, Section 3(46) of the Act requires that any service classified as a "telecommunications services" must be offered for a fee to the public.[26] Futurephone did not charge the public for its service and therefore cannot be classified as a telecommunications service. The Commission has held that any provider that does not charge a fee for its service cannot be classified as a telecommunications carrier.[27]

Also, unlike AT&T's IP interexchange and prepaid calling card services, Futurephone's use of the PSTN ended at its Internet portals. Futurephone utilized the Internet, not the PSTN, to transmit calls overseas; it paid foreign ISPs to terminate the calls on the Internet. Accordingly, Futurephone's services did not "originate and terminate" on the PSTN, which is a key element in the FCC's determination that other services should be subject to the end-to-end analysis.[28]

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[23] Id. at ¶¶ 1, 10-13.
[24] Id.
[25] See Regulation of Prepaid Calling Cards, 21 FCC Rcd 7290, ¶¶ 18-20 (2006).
[26] See 47 U.S.C. § 153(46).
[27] See Petition for Declaratory Ruling the Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service, 19 FCC Rcd 3307, ¶10 (2004).
[28] See IP in the Middle at ¶¶ 1, 10-13; Prepaid Calling Cards at ¶¶ 18-20.

Moreover, Futurephone performed a voice to Internet protocol conversion, and, provided callers with enhanced functionality. When a LEC delivered a call to a Futurephone Internet portal, it handed off the call to Futurephone's Internet server, which converted the voice protocol to Internet protocol; the call was then sent as packets of data via the public Internet. Through its protocol conversion, Futurephone was able to provide the caller with voice communications (using IP protocol) for the price of a domestic long distance call. Futurephone added enhanced functionality to the domestic long distance calls provided by the IXCs because the end-users ordered a different service (international calling) and obtained cost savings for those international calls through Futurephone.[29] Hence, Futurephone is an ESP.

The Commission has held that entities such as Futurephone that utilize LEC services to provide others with access to the Internet (i.e., non-telecommunications carriers such as Internet access providers) are deemed end-users of telecommunications services.[30] The U.S. Court of Appeals for the D.C. Circuit has affirmed that Internet access providers, which are a subset of ESPs, are the "called parties" regarding telecommunications service delivered to them by LECs, and that such traffic terminates at their premises.[31]

ESPs do not utilize the PSTN like telecommunications carriers, and telecommunications traffic terminates at the ESP's premises.[32] Because ESPs receive a call and then originate further communications over the Internet, where packets of information are sent via routers and other

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[29] See IP in the Middle at ¶ 12.
[30] See Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151, ¶11 (2001). In contrast to Futurephone's situation, in cases where the Commission determined that a voice communication "extend[s] from the inception of a call to its completion, regardless of any intermediate steps," invariably involved interexchange calls, i.e., telecommunications services. See, e.g., In re Long Distance/USA. Inc., 10 FCC Rcd 1634, ¶ 13 (1995); Teleconnect Co. v. Bell Tel Co. of Pa., 10 FCC Rcd 1626, ¶ 14 (1995).
[31] See Bell Atlantic Telephone Companies v. FCC, 206 F.3d 1, 6 (DC Cir. 2000) (subsequent history omitted).
[32] Id. at 6-7.

computers to their ultimate destination, the traditional end-to-end analysis is inapplicable to them regarding termination points.[33]

In short, Futurephone was the called party for IXC traffic that LECs terminated at Futurephone' Internet portals. LECs properly assessed access charges on the IXCs for terminating traffic to Futurephone's Internet portals. Futurephone's service was a "two-call" arrangement, and its service cannot be classified as an end-to-end telecommunications service. If it were so classified, the IXCs, instead of Futurephone, would have paid termination charges to the overseas ISPs, which the IXCs never did.

## VI. Shared Access Arrangements are for the Caller's Benefit

The Commission has a long history of promoting innovative, competitive services. But, in the NPRM, the Commission raises the possibility of adopting a policy that could stifle such competition; it seeks comment on whether the sharing of access charges between a LEC and a customer providing high volume traffic violates Section 201(b) of the Act.[34] The Commission has previously held that such arrangements are not unjust or unreasonable, and, because competitive services such as Futurephone's depend on revenue sharing, the Commission should not reverse that regulatory conclusion in this proceeding.

### A. Access Revenue Sharing Arrangements are Legal

In AT&T Corp. v. Jefferson Telephone Co.,[35] the Commission held that a revenue marketing arrangement similar to that complained of by the IXCs did not violate any provision of the Act.[36]

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[33] Id.
[34] See NPRM at ¶ 20 (citation omitted).
[35] In the Matter of AT&T v. Jefferson Telephone Co., 16 FCC Rcd 16130 (2001).
[36] Id. at ¶¶ 14-16 (citations omitted).

This arrangement involved: (a) a LEC's customer providing free services; (b) that customer derived all its revenues from revenue sharing with the LEC; (c) the customer provided marketing services in exchange for compensation from the LEC; and (d) the business arrangement led to increased traffic, causing more toll charges for AT&T and increased monthly access revenues for the LEC .[37]

On the facts, the FCC held that AT&T had failed to show that Jefferson's revenue sharing arrangement was unjust or unreasonable.[38] In a companion case, AT&T v. Frontier Communications, the FCC adopted the reasoning of Jefferson Telephone and held that another revenue-sharing arrangement was not unlawful.[39]

In the Farmers & Merchant's case, the Commission stated that while it did not specifically hold in Jefferson that access sharing arrangements were appropriate, it examined and failed to find anything illegal with arrangements wherein net payments were made by the carrier to its customers.[40]

And in the Access Charge Reform proceeding, the Commission reviewed numerous comments describing arrangements involving marketing fees paid by carriers to that created high volume traffic.[41] The Commission declined to find that such arrangements were unjust or unreasonable.[42] There is no public interest rationale for revisiting and reversing those conclusions in this rulemaking proceeding.

B. Access Sharing Benefits Callers and the Public Interest

Access sharing agreements enable entities such as Futurephone to provide services that

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[37] Id. at ¶¶ 2-6 (citations omitted).
[38] Id. at ¶ 16 (citations omitted).
[39] In the Matter of AT& Corp. v. Frontier Communications, Inc., 17 FCC Rcd 4041 at ¶ 1 (2002).
[40] See Farmers & Merchant's at n.115.
[41] See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 19 FCC Rcd 9108, ¶¶ 64 -72 (2004).
[42] Id. at n.257; see also California Payphone Assoc., 12 FCC Rcd 14191, ¶ 35, n. 87 (2004) (Commission finds lawful a revenue sharing agreement for payphone usage between amunicipality and ILEC providing the phones)

benefit calling parties. The Commission has acknowledged that the public benefits when a service provider offers an additional functionality and reduced costs for services.[43] Under these circumstances, there is no "regulatory arbitrage."[44]

Futurephone provided just such an enhanced functionality by enabling consumers to make international calls for the price of domestic long distance calls. Futurephone cannot provide its economical overseas calling service without recovering its costs through the sharing of access charges with the terminating LECs, and disallowing revenue sharing would be the death knell for Futurephone and similarly situated ESPs. While there may be other ways to compete against entrenched IXCs (such as prepaid calling cards, "Skype" and other Internet-based services), Futurephone should not be punished by regulators for having created a new, enhanced form of service as an alternative to conventional international call services.

Moreover, LECs should be entitled to recover their costs for providing services that they outsourced to Futurephone via access revenue sharing. The LECs that delivered traffic to Futurphone were exclusively small LECs; most were competitive local exchange carriers ("CLECs") and rural local exchange carriers ("RLECs"). These LECs found it more convenient to outsource sales, marketing, as well as enhanced services to Futurephone. If these LECs had been able to provide these services in-house, they could have recovered them in their rate base, which many larger LECs do. Because originating callers obtain enhanced services for the same fee they pay to IXCs for interstate calls, there is no reason why the LECs should be penalized for outsourcing the services to Futurephone, which makes those services possible.[45] The IXCs also benefit from this arrangement,

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[43] See IP in the Middle at ¶ 17.
[44] Id.
[45] Id.

since it is their customers that receive the enhanced services from the LECs that outsource services to Futurephone.

C. Access Sharing is Not an "Unlawful Rebate"

The Commission sought comment on whether an access revenue sharing arrangement between a LEC and a customer providing high volume traffic to a LEC constitutes an "unlawful rebate" in violation of Section 203(c) of the Act.[46] The access sharing arrangements Futurephone had with LECs does not constitute an unlawful rebate; the Commission has held that such arrangements are legal.

In a 1993 case, AT&T was accused of unlawful rebates of tariffed charges to hotels and other "traffic aggregators," because AT&T paid commissions to those traffic aggregators to increase the volume of 0+ traffic to AT&T.[47] The Commission stated:

> Initially, we note that a rebate, by definition, is normally paid by a carrier to an end user customer of the carrier's tariffed service. Although the traffic aggregator is the subscriber for the 0+ service from its premises, it is not the customer for purposes of a rebate analysis, because it is not the party that makes the 0+ call and pays the tariffed rates. In the instant case, it is clear that while AT&T pays commissions based on the volume of "0+" traffic to traffic aggregators such as hotels, AT&T's 0+ customers pay the full tariffed rate for AT&T's interstate long distance services. Under these circumstances, as the Bureau made clear in its Private Payphone Order, there is no unlawful rebate.[48]

Futurephone's access sharing arrangement is fundamentally the same as AT&T's long-standing practice of paying aggregators for increasing the volume of 0+ traffic. Futurephone is a LEC subscriber, but it is not the party that makes the calls and pays the tariffed rates. Hence, like AT&T's commission arrangements with traffic aggregators that provided high volume traffic to

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[46] See NPRM at ¶ 20.
[47] See Telesphere International, Inc. v. AT&T, 8 FCC Rcd 4945 (1993).
[48] Id. at ¶ 12 (citations omitted).

AT&T, there is no unlawful rebate in LECs sharing access revenues with Futurephone.

## VII. Reasonable Access Rates for High Volume Traffic

The crux of this proceeding concerns the establishment of reasonable rates of return for the termination of high volume traffic. The Commission has expressed apprehension about situations where rate-of-return carriers that set their access rates high based on higher than average per-minute costs and low volumes of traffic based on historical levels could earn unreasonably high returns when they experience high volume traffic.[49] Hence, the Commission is considering disallowing certain arrangements that lead to high volume traffic.[50]

Rather than doing away with arrangements that allow innovative services to flourish, the Commission should adopt guidelines for "reasonable" access rates for high volume traffic. There is certainly nothing unlawful about high volume traffic per se. Carriers depend on increased traffic to cover their network costs and to provide enhance services to local and distant callers. The Commission acknowledged as much in the NPRM, finding that "it is reasonable for carriers to seek increase demand for their services . . . ."[51]

When a provider of access services experiences an increase in its usage, other carriers such as IXCs that use the access providers' services should also see an increase in the use of their own services by end users. If the end users take their service on a per unit basis, increased traffic means additional revenues. Many IXCs, however, provide flat-rate, unlimited usage services to their customers, which cause their costs to go up when traffic increases with no concurrent rise in revenue.

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[49] See NPRM at ¶ 13.
[50] Id. at ¶ 19.
[51] Id. at ¶ 1.

Consequently, IXCs may need to reconsider how they charge their customers in order to profit from high-volume traffic.

In the NPRM, the Commission identifies a particular type of "high volume" traffic that has given rise to the alleged "unreasonableness" of LECs' access charges: traffic terminated at the premises of ESPs such as Futurephone.[52] This high volume traffic consists of IXC inbound traffic where demand exceeds historic levels used by a LEC to set rates in its currently effective tariff, or exceeds local switching demand in the same month of the preceding year by a large percentage.[53]

This high volume traffic could be categorized separately in a LEC's tariff and a reasonable access rate applied to it. The Commission has wide discretion to select methods to determine what constitutes reasonable access rates.[54] Courts are particularly deferential when reviewing the Commission's determination of what constitutes a reasonable access rate in a particular situation; such agency action is far from an exact science and involves "policy determinations in which the agency is acknowledged to have expertise."[55] The FCC may establish a regulatory scheme that produces a zone of reasonableness for rates, rather than insisting upon a single method to determine whether particular access rates are just and reasonable.[56]

A "range of reasonableness" for termination access rate for high volume traffic could be based on the IXCs' average charge to originate interstate calls, which the FCC recently determined to

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[52] Id. at ¶ 22.
[53] Id.
[54] See MCI Telecommunications Corp. v. FCC, 675 F.2d 408, 413 (D.C. Cir. 1982); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1228 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981).
[55] See Southwestern Bell v. FCC, 168 F.3d 1344, 1352 (D.C. Cir. 1999); Time Warner Entertainment v. FCC, 56 F.3d 151, 163 (D.C. Cir. 1995) (quoting United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983)).
[56] See e.g., FERC v. Pennzoil Producing Co. 439 U.S. 508, 517 (1979); American Telephone & Telegraph Company v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (quoting Jersey Cent. Power & Light v. FERC, 810 F.2d 1168, 1177 (D.C. Cir. 1987)); Wisconsin v. FPC, 373 U.S. 294, 309 (1963); FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 585-86 (1942).

be approximately four cents per minute.[57] In the past, the Commission has found carrier origination costs to be a rough proxy for determining reasonable termination access costs.[58] This proposal promotes regulatory symmetry: if the IXCs' themselves deem four cents per minute to be reasonable to originate their calls, the same charge for terminating those calls ought to be reasonable. And, so long as those termination rates are reasonable, the IXCs should have no reason to object if a terminating LEC opts to share those terminating charges with a third party provider of enhanced services.

Notably, Futurephone had a marketing arrangement a LEC in Minnesota that charged a tariffed termination rate of three cents (Futurephone's agreement with the LEC was to receive much less). AT&T sued the LEC and Futurephone as well as other parties for the offering of their services in Minnesota.[59] This illustrates that carriers' contentions that all of these services are provided pursuant to unreasonable rates is flatly wrong. Additionally, it shows that Futurephone's service is certainly not dependent of working with LECs that are charging unreasonable rates or receiving inordinately high rates of return.

## VIII. IXCs Should Not Be Permitted to Engage in Illegal Self-Help

The FCC has stated unequivocally that an IXC's refusal to pay a LEC's legally tariffed access charges while receiving access services from the CLEC is impermissible "self-help" in violation of Section 201(b) of the Act.[60] Nevertheless, some IXCs have ceased paying tariffed

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[57] See e.g., Trends in Telephone Service 2007 at 13-7.
[58] See e.g., In the Matter of MTS & WATS Market Structure, 4 FCC Rcd 5048, ¶ 2 (1988)
[59] See AT&T Corp. v. Tekstar Communications, Inc., et al., No. 0:07-cv-02563-ADM/JSM (MN 2007).
[60] See MGC Communications, Inc. v. AT&T Corp., 14 FCC Rcd 11647, ¶ 27 (1999).

access charges to LECs in what they call a "protest" to the higher access charges due to increased traffic.[61]

The FCC should clearly state in this rulemaking proceeding that increased traffic to an exchange area is not a legitimate reason for any carrier to cease paying access charges or to stop providing service to LECs. In 2001, the Commission issued a Declaratory Ruling stating that IXCs could not refuse to carry traffic due to what they deemed to be "excessive" access charges: "[W]here the rates charged for an access service are presumptively reasonable at the time a service is offered, an IXC cannot refuse to exchange originating or terminating traffic with the CLEC, because such a practice would threaten to compromise the ubiquity and seamlessness of the nations telephone network."[62]

The Commission's rules and regulations provide several mechanisms to address allegations of unreasonable access charges, including formal complaints and tariff investigation mechanisms. Carriers alleging such unreasonable rates should seek relief through those mechanisms, rather than through self-help such as call-blocking or withholding payment of tariffed charges.[63]

Refusing to pay access charges is tantamount to denying service.[64] Futurephone was forced out of business due to various IXCs' refusal to pay legally tariffed access charges. Accordingly, Futurephone requests that the Commission specifically hold in this proceeding that IXCs may not refuse to pay LECs' legally tariffed access charges.[65]

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[61] See e.g., Farmers & Merchants at ¶ 28.
[62] See AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues, 16 FCC Rcd 19158, ¶ 15 (2001).
[63] Id. at ¶ 1.
[64] Id.
[65] See In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers: Call Blocking by Carriers, Declaratory Ruling and Order, 22 FCC Rcd 11629 (2007).

## IX. Conclusion

For all the foregoing reasons, Futurephone respectfully requests the Commission adopt rules and guidelines to promote and encourage Futurephone's and similar service providers' competitive service offerings. Futurephone's service serves the public interest by providing a low cost alternative to IXCs' over-priced international calling services. The Commission has historically promoted competitive services through tariff interpretations; it can do that here. Futurephone's access revenue sharing arrangement with the LECs is entirely proper and enables Futurephone to provide these enhanced services; this practice should be deemed "just and reasonable" and in accordance with the Communications Act.

The FCC should also clarify in this proceeding that domestic terminating access tariffs apply to services such as Futurephone's, that Futurphone is an ISP or an ESP and that inbound calls to Futurephone's Internet portal terminate in the U.S.

The Commission should also consider adopting Futurephone's proposed rate for high-volume traffic, which would promote regulatory symmetry. Finally, the Commission should help prevent additional litigation by declaring that IXCs' may not engage in illegal self-help by refusing to pay LECs' legally tariffed access charges.

Respectfully submitted,

**FUTUREPHONE.COM, LLC**

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Date: December 17, 2007

**CERTIFICATE OF SERVICE**

I, Elaine Simons, an employee of Venable LLP, hereby certifies that on this 17th day of December, 2007, true and complete copies of the foregoing Comments of Futurephone.com, LLC, in Rulemaking Proceeding: In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, were served via first class mail, postage prepaid, on the following FCC officials:

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**EXHIBIT ONE**

## AT&T BASIC SERVICE PER MINUTE RATE

http://www.bellsouth.com/consumer/bsld/iepRates.html

| Country | AT&T® Basic Service Per Minute Rate **Monthly Recurring Charge** |
|---|---|
| Brazil | $3.86 |
| Canada | $0.85 |
| Colombia | $3.90 |
| Cuba | $5.09 |
| El Salvador | $4.06 |
| Germany | $2.37 |
| Guatemala | $4.03 |
| Honduras | $3.66 |
| India | $6.19 |
| Italy | $3.05 |
| Jamaica | $3.76 |
| Japan | $3.01 |
| Mexico 1 | $1.32 |
| Mexico 2 | $2.77 |
| Nicaragua | $3.86 |
| Philippines | $4.20 |
| Spain | $3.16 |
| Trinidad & Tobago | $3.32 |
| United Kingdom | $2.25 |
| Venezuela | $2.85 |